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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1372

ANTHONY P. TRAVISONO, et al.,
PETITIONERS,

v.

ANTHONY SOUZA, et al.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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ANTHONY SOUZA, et al.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners, Anthony P. Travisono, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this case on March 11, 1975.

Opinions Below

The opinion of the United States Court of Appeals handed down on March 11, 1975 which is at issue here has not yet been reported and is set out in Appendix "A"

hereto. The lower court's opinion on the merits is reported at 368 F. Supp. 959 (D.R.I. 1973), and the affirmance of the Circuit Court at 498 F.2d 1120 (1st Cir. 1974).

Constitutional Provisions

United States Constitution, Articles of Amendment 11 and 14.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on March 11, 1975 and appears as Appendix "A" hereto. We invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Statement of the Case

The case began in June 1972 when a newly appointed warden at the Rhode Island Adult Correctional Institutions (ACI) barred law students assisting attorneys of the Inmate Legal Assistance Program (ILAP) from the prison. In addition, the ILAP was ousted from its institutional office space, and the access of attorneys to the prison was curtailed. On July 27, 1973, the United States District Court for the District of Rhode Island issued a preliminary injunction granting the right of any attorney to consult with an inmate at the ACI during business hours, ordered a room for attorney consultations to be constructed within 2 weeks, and reserved decision on the question of law student paralegals access to the prison.

On December 18, 1973, the District Court handed down a decision (368 F. Supp. 959 (D.R.I. 1973)) holding that inmates had a constitutional right to "qualitatively competent legal assistance, reasonably available and capable

of responding to the needs of the prison population." The Court found the use of law students by the ILAP was essential for the satisfaction of those rights and that the State of Rhode Island could not summarily bar law students from the prison. The right of an attorney to meet with his inmate client "of necessity filters down to his paralegal assistants." 368 F. Supp. at 970. On appeal, the First Circuit affirmed 498 F.2d 1120 (1st Cir. 1974).

Attorneys for the Plaintiffs subsequently applied to the District Court for costs including attorneys fees. On the basis of First Circuit opinions touching on that question *viz., Hoitt* v. *Vitek,* 495 F.2d 219 (1st Cir. 1974) and *Natural Resources Defense Council, Inc.* v. *E.P.A.,* 484 F.2d 1331 (1st Cir. 1973), the District Court awarded full attorney fees under 42 U.S.C. § 1983 at the rate of $60 per hour. (D.R.I. No. 5261) (opinion dated July 8, 1974). Over $15,156 in attorneys fees was involved. On Appeal, the First Circuit considered both "the difficult question of whether attorneys' fees awards against a state are barred by the eleventh amendment" and whether the award, if constitutional, was excessive. Appendix A at 7, 8. The Circuit Court considered the recent decisions holding both ways, but decided that an attack on constitutional grounds was foreclosed by its own recent decisions. Appendix A at 7. In addition, the Court limited the attorneys' fees to a rate of $30 per hour in court and $20 per hour out of court.

Issue Presented

Does the Eleventh Amendment prohibit the award of attorneys' fees as costs against a state or its employees in their official capacities in litigation to enforce the Fourteenth Amendment?

Reasons for Granting the Writ

I. The Circuit Courts of Appeals Are Divided on the Question of Whether the Eleventh Amendment Prohibits the Award of Attorneys' Fees Against a State.

The Third and Sixth Circuits have ruled that the Eleventh Amendment forbids an award of attorneys' fees against a state in order to enforce the Fourteenth Amendment. *Skehan* v. *Board of Trustees*, 501 F.2d 31, 42 (3d Cir. 1974); *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974). The First, Second, Fifth, and Ninth Circuits have held to the contrary. *Souza* v. *Travisono*, infra, Appendix "A" (1st Cir. 1975); *Class* v. *Norton*, No. 74-1702 (2d Cir. October 10, 1974); *Jordan* v. *Fusari*, 496 F.2d 646 (2d Cir. 1974); see also, *Stolberg* v. *Members of the Board of Trustees for State College of Connecticut*, 474 F.2d 485 (2d Cir. 1973); *Gates* v. *Collier*, 489 F.2d 298 (5th Cir. 1973), rehearing en banc granted, 500 F.2d 1382 (1974); *Brandenburger* v. *Thompson*, 494 F.2d 885 (9th Cir. 1974). This conflict of the Circuit Courts of Appeal on this important Constitutional question supports the establishment of a uniform rule. See *Avco Corporation* v. *Aero Lodge*, 390 U.S. 557, 559 (1968).

II. The Basic Issue Involved Is Whether the Eleventh Amendment Is Limited by the Fourteenth and This Issue Can Only Be Decided Finally by a Decision of the United States Supreme Court.

The split in the decisions of the Circuit Courts of Appeals is a result of uncertainty over whether the language of the Fourteenth Amendment is a limitation on the immunities guaranteed by the earlier Eleventh Amendment. This issue of the relationship between the Eleventh and

Fourteenth Amendments was expressly left open in *Ex parte Young*, 209 U.S. 123, 150 (1908); cf. *Edelman* v. *Jordan*, 415 U.S. 651, 694 n.2 (1974); cf. *Curtis* v. *Loether*, 415 U.S. 189, 198 n. 15 (1974). A resolution of the issue posed by this case requires a determination of this fundamental question. Petitioner here asserts that an award of approximately $7000 is not an ancillary matter, especially since the award in this case which involved few lawyers is small compared to the future liability opened by the First Circuit's ruling in *Souza* v. *Travisono, supra*. This case squarely poses the issue of whether the proscription of the Eleventh Amendment is limited by the Fourteenth.

Conclusion

For the above reasons, your petitioner prays that this Honorable Court grant a Writ of Certiorari directed to the United States Court of Appeals for the First Circuit and that this Honorable Court establish a briefing schedule towards the ultimate determination of this case.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 74-1243

ANTHONY SOUZA, et al.,
PLAINTIFFS, APPELLEES,
v.
ANTHONY P. TRAVISONO, et al.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

W. Slater Allen, Jr., Assistant Attorney General, with whom *Richard J. Israel*, Attorney General, was on brief, for appellants.
Ralph J. Gonnella, with whom *Hodosh, Spinella, Hodosh & Angelone* was on brief, for appellees.

March 11, 1975

CAMPBELL, *Circuit Judge*. In *Souza* v. *Travisono*, 368 F. Supp. 959 (D.R.I. 1973), the district court held that in refusing to let law students render legal aid to inmates at the Rhode Island Adult Correctional Institutions (ACI), the warden deprived inmates of a constitutional right of meaningful access to the courts and also of a more general right to legal assistance with personal matters. Thereafter, the Supreme Court in *Procunier* v. *Martinez*, 416 U.S. 396, 419 (1974), held that prisoners have a due process right of access to courts, including reasonable access to law student agents of attorneys, "to challenge unlawful convictions and

to seek redress for violations of their constitutional rights." We then affirmed the district court decision in *Souza* to the extent it was governed by *Procunier*, but left unanswered whether inmate access to law students must be granted for more mundane problems.[1] 498 F.2d 1120 (1st Cir. 1974). On petition for recovery of costs and attorney's fees, the district court granted fixed costs of $464.85 to plaintiff inmates and attorneys' fees of $11,340.00, $2,040.00, and $1,776.00 to plaintiffs' three private counsel. Defendant state officials appeal from that part of the order allowing fees.

This case raises the difficult question of whether attorneys' fees awards against a state are barred by the eleventh amendment. There is also a serious question, should the award be constitutional, whether it is excessive. But first we turn briefly to appellants' general challenge to the court's authority to make any award of attorneys fees in a case like this one. We hold that line of attack to be clearly foreclosed by recent decisions of this circuit. *Hoitt* v. *Vitek*, 495 F.2d 219 (1st Cir. 1974); *see Knight* v. *Auciello*, 453 F.2d 852 (1st Cir. 1972); *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331, 1333 (1st Cir. 1973).

As a predicate to its award the district court found that the litigation benefited the plaintiff class and that it furthered the significant public policy reflected in 42 U.S.C. § 1983. The court expressed the view that the protection of inmates' constitutional rights depended on the efforts of skilled attorneys who "should be encouraged to undertake such difficult and time consuming litigation." We upheld this "public benefit — private attorney general" rationale in *Hoitt*.

We can see no factual basis for distinguishing this case

[1] This court considered the record inadequate for deciding this further question and noted that controversy might not exist because, among other things, there was no showing that a new group assuming the inmate legal assistance function needed or used law student assistants. 498 F.2d at 1124.

from *Hoitt*. It is immaterial whether appellants were, as they assert, in sincere doubt as to constitutional requirements prior to *Procunier*. The theory behind awarding attorneys' fees in this instance was not to punish appellants for bad faith but to recompense those who by helping protect basic rights were thought to have served the public interest.

Nor do we see merit in the argument that the attorneys' services were valueless because the Supreme Court's decision in *Procunier* would have resolved matters in any event. The need for the attorneys' services is not to be judged in hindsight but as it reasonably appeared at the time. *Procunier* vindicated, in important ways, the merits of the inmates' original position, and their attorneys earlier prevailed in the district court. Having forced the inmates to sue in order to establish their rights, it does not lie in appellants' mouths to disparage their having done so.

Thus, apart from the question of the eleventh amendment, which we did not consider in *Hoitt*, we find no error in the district court's discretionary ruling to grant attorney's fees in this case.

We turn next to whether taxation of attorneys' fees against defendant state officials is an award of money against an unconsenting state in violation of the eleventh amendment. The instant litigation was brought by Rhode Island inmates against Rhode Island officials. Notwithstanding its language,[2] the eleventh amendment has been held also to embody a notion of sovereign immunity restricting federal judicial power over litigation against a state by its own citizens as well as by citizens of other states. *E.g., Edelman* v. *Jordan*, 415 U.S. 651, 662-63 (1974);

[2] The eleventh amendment provides:
"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Employees of the Dep't v. *Department of Pub. Health & Welfare*, 411 U.S. 279 (1973); *Duhne* v. *New Jersey*, 251 U.S. 311 (1920); *Hans* v. *Louisiana*, 134 U.S. 1, 10-15 (1890).

It was held in *Edelman* that a citizen may not recover "an accrued monetary" liability from a state. 415 U.S. 664. A remedy in the form of a recovery of money was distinguished from an injunction or declaratory judgment. These latter "prospective" remedies are not barred by the eleventh amendment even though they may have the "ancillary effect" of a drain upon the state treasury. 415 U.S. at 666 n. 11, 668; *see Ford Motor Co.* v. *Dept. of Treasury*, 323 U.S. 459 (1945); *Ex parte New York*, 256 U.S. 490, 500 (1921); *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

Viewed in isolation, an award of attorneys' fees in the present case might seem akin to a money judgment against Rhode Island. Since defendant officials were sued for acts done apparently in good faith and within their official authority, they will doubtless be reimbursed by the state for the award. *Cf. Edelman, supra* at 664-68. Thus arguably the fees are an unconstitutional exaction upon Rhode Island. On the other hand, the fees are incidental to the main litigation, which, being for injunctive and declaratory relief, was permissible under the eleventh amendment. An award of attorneys' fees is perhaps so "ancillary" as to be constitutional, even though there will be some drain on the state treasury. Which view is correct is presently unclear. *Compare, e.g., Skehan* v. *Board of Trustees*, 501 F.2d 31 (3d Cir. 1974), *and Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974), *with Class* v. *Norton*, No. 74-1702 (2d Cir. Oct. 10, 1974), *Gates* v. *Collier*, 489 F.2d 298 (5th Cir. 1973), *petition for rehearing en banc granted*, 500 F.2d 1382 (5th Cir. 1974), *and Sims* v. *Amos*, 340 F. Supp. 691 M.D. Ala. 1972), *aff'd mem.*, 409 U.S. 942 (1973).

The Rubicon was seemingly crossed in this circuit in

Boston Chapter NAACP, Inc. v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), where we approved the assessment of the costs of an appeal in a civil rights action against Massachusetts officials. We relied upon *Fairmount Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1928), in which the Supreme Court declared that sovereign immunity did not protect a state against judgment for costs in litigation before the Supreme Court. The Court viewed the costs as incident to its regular jurisdiction, the awarding of costs being "the invariable practice". *Id.* at 77.

If, as we held in *Boston Chapter NAACP*, the eleventh amendment allows costs to be assessed against state officials, it is hard to see why it should bar attorneys' fees. Both are in similar relationship to the main litigation and both should stand or fall together. It is true that there is less sanction in our law for attorneys' fees; and the awarding of fees in these precise circumstances and upon the rationale we approved in *Hoitt* has yet to be considered by the Supreme Court. Conceivably costs, being more traditional than attorneys' fees, are allowable, but attorneys' fees are not. Conceivably attorneys' fees based on certain rationales are allowable but others are not. Nonetheless, whatever the situations ultimately deemed suitable for the award of the attorneys' fees, such fees, to the extent allowable, seem to us generically to be the same as court costs. They are a part of the litigation expense deemed, for whatever reason, recoverable by the successful party or attorney. Any effort to distinguish for eleventh amendment purposes on the basis of theories of award would invite endless confusion. And to the extent states and state officials are, under our federal system, amenable to suit in federal courts, they should be responsible for costs and fees incidental to litigation to the same degree as others. To that extent, as the Supreme Court said in *Fairmont*, a state may lose "some of its sovereign character". 275 U.S. at 77. Accordingly,

for reasons set forth in *Boston Chapter NAACP*, we hold that attorneys' fees, like costs, are not barred by the eleventh amendment.

Appellants argue that the amount of attorneys' fees awarded was excessive. Without belittling the value of the services, we agree. The district court awarded fees at the rate of $60 per hour, based on affidavits of two prominent local attorneys citing returns of $60 and $70 per hour as reasonable. Noting that the specific amount to be awarded was within the courts discretion, the court listed as relevant factors "the circumstances surrounding the case, its importance and complexity, and the skill, experience and professional standards of the attorney." The court found plaintiffs' attorneys to be "skilled, well prepared and obviously experienced in prison litigation"; their work was of "high caliber" and of "unquestioned assistance" to the court. Appellants have not contested the hours spent by plaintiffs' counsel, but argue that a skilled and experienced counsel able to charge $60 per hour in the marketplace would not have required so many hours to prepare and conduct this case.

We disagree with the assumption of the district court and both parties that the hourly rate is to be based on the reasonable marketplace rate for such services. This is not a case in which the attorneys sold their services to a pirvate client willing to pay the market price for them. *Cf. Natural Resources Defense Council, Inc.* v. *EPA, supra*, 484 F.2d at 1338-39.[3] Those who will ultimately pay the fees, the Rhode

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[3] We said in that case, in reference to the issue of attorneys' fees to be imposed upon an agency of the federal government,

> "We will scrutinize carefully the requested costs and fees. Petitioners are not a public agency and are legally responsible to no one but themselves; we must satisfy ourselves that the taxpayer's money will not be used to support needless or excessive legal items. We must also recognize that petitioners, as surrogate attorneys for the interest of the public and the EPA, have volunteered and 'imposed' their services on 'clients' that

Island taxpayers — on a theory, in part, of public benefit — have had no opportunity to pass on either the extent of the services or on the fees.

Judge Theis of the District of Kansas, dealing also with an award of fees in civil rights litigation, put the matter in what we hold to be proper perspective:

> "In determining the amount of an award of reasonable attorneys' fees, the Court is mindful that the award is designed to effectuate public policy, encourage private litigation, and spread litigation expenses equitably among those benefiting from the institution of the action—not to punish the wrongdoer or to reward the successful plaintiffs or their attorneys. A member of the legal profession has the obligation to represent clients who are unable to pay for counsel and also to bring suits in the public interest. While embarking upon their duties, they should not be motivated by a desire for profit but by public spirit and sense of duty."

Gilpin v. *Kansas State High School Activities Ass'n, Inc.*, 377 F. Supp. 1233, 1253 (D. Kan. 1974).

Here we have the further aspect that the litigation was only partially successful. While, as we have noted, the attorneys are not to be denied reasonable fees merely because *Procunier* settled favorably one of the main questions, it is appropriate, in establishing a reasonable fee, to take into account the net result of their efforts.

We conclude, as did Judge Theis and as did Chief Judge Johnson in *Wyatt* v. *Stickney*,[4] that the Criminal Justice Act is a reasonable point of reference in establishing a fee. We recognize that inflation tends to render the fee schedule under the Act less adequate than formerly; on the other

never contracted for them. As attorneys for involuntary clients, their fees may properly be less than those they could have received by entering the marketplace and selling their services to the private client who would make the highest bid for them."

[4] 344 F. Supp. 387 (N.D. Ala. 1972).

hand, it has yet to be modified legislatively, and it provides a benchmark. The alternative — leaving the matter to the total discretion of each judge — invites a wide disparity of fees and, we would suspect, the sort of public cynicism which can only undermine the ideals which the main litigation sought to promote. We add, however, that while the Criminal Justice Act rate of $30 per in-court hour and $20 per out-of-court hour should be the usual guideline in cases of this nature, we might sanction departures therefrom in cases of truly exceptional public importance. Moreover, should inflation continue to take its toll, we will keep an open mind to some general upward revision in the generality of cases.

We accordingly reverse the order of the district court as to the amount of attorneys' fees,[5] and remand for redetermination of the fees on the basis of a rate of $30 per in-court hour and $20 per out-of-court hour.

So ordered.

[5] We do not disturb the grant of $464.85 for fixed costs.